THE COPYRIGHT LAW: NEARLY SIXTY YEARS LATER

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The present copyright law is obsolete in many respects. Particularly, our dual system of common law and statutory protection, the measuring of the duration of copyright on the basis of two terms running from publication, the requirement of notice, the doctrine of "fair use", and the application of the law to various methods of transmission and data processing are matters calling for statutory clarification and revision. The author summarizes the effect of the copyright law revision bill now before Congress upon these and other copyright problems.

I. THE NEED FOR REVISION

To those not already aware of the fact, it may come as a surprise to learn that the copyright law of the United States has not been changed in its essential features since 1909.[1]

There may be a few hardy souls of great-grandfatherly age who know better, but we of less venerable memory feel sure that the problems of organized society were far simpler in the first decade of the twentieth century. We are ready to accept the premise that legal structures designed in that bygone era are not adequate to accommodate the new mechanisms and changed ways that have become our daily environment. With its convulsions of two world wars, a profound economic depression, political and economic upheavals in a large part of the globe, and revolutionary explosions of knowledge and technology, the past half century, we think, has wrought greater changes in our way of life, now and for the near future, than any like period in several milleniums.

These observations are pertinent to our present copyright law. Technological innovation is nowhere more apparent than in the means used to reproduce and communicate the words, sounds, and images by which human thought and feelings are expressed. Who in 1909 dreamed of radio or television, electrostatic and offset copying machines or magnetic tape recording and videotape; of computer storage, printout, and image reproduction, facsimile transmission or communications satel-

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[1] The present copyright law is title 17 of the United States Code, which is a codification of the Act of 1909, ch. 320, 35 Stat. 1075, with subsequent amendments.

lites? How many, even, were the prophets who then foresaw that the "flickers" of the nickelodeon and the scratchy recordings heard on the graphophone or talking machine would grow into major producers and consumers of the world's literature, music, and art?

It is easy, perhaps, to exaggerate the obsolescence of the 1909 law. To bring the picture into proper perspective, it needs to be said that while the philosophical foundations of the copyright system embodied in the 1909 law (and its predecessors) are occasionally challenged, they are still thought to be basically sound; the new model is being built on much the same principles. Moreover, the drafters of the old law were wise in formulating it, for the most part, in terms of broad conceptual import, which has allowed the courts much of the room needed to fit new pieces into the statutory pattern.

Nevertheless, that pattern itself is now considered deficient in a number of respects. For one, we lag behind the other advanced countries in the protection we accord to writers, composers, and artists. In a shrinking world, where the international dissemination of the works of authors is increasingly important, the fundamental points at which our copyright system remains at variance with the system prevalent abroad become obstacles to cultural exchange.

I shall not attempt to catalog all the deficiences of the present statute (and one man's bête noir may, of course, be another's sacred cow), but a few prime examples should be enough to show that the 1909 statute is outmoded. In addition, some of the important instances will be cited of new questions to which the application of the old statute is uncertain, calling for clarification, at least, in a revision of the statute. Finally, due in part to the complexity of some of its provisions, in part to patchwork amendments made during the legislative process, and in part to the judicial gloss needed to adapt its terms to changed conditions, the existing statute is replete with language that lends itself to uncertainty, confusion, or misconception;[2] this alone would be enough to warrant rewriting the law.

A. *Publication as Point of Inception*

Historically, copyright was an offspring of the printing press. It came into being as the means of giving an authorized printer the exclusive right to print and publish copies. The author could control the authorization of the first printing and publication by keeping physical possession of his manuscript until he chose to have it published; the common law recognized the author's right to keep his writings private,

[2] Some prime examples are §§ 1, 16, and 101(b) of 17 U.S.C.

under the rubric of "literary property" or the "right of first publication." But once the work was published, anyone could print and publish additional copies; to restrain them required the creation by law of an exclusive right in the author or authorized printer. So grew up in England, as part of the American heritage, the dual system of common law "literary property" before publication and statutory "copyright" thereafter.[3]

The copyright system of the United States still maintains this dualism. Until a work has been published, any unauthorized use that discloses it to the public violates the author's literary property rights under the common law. Upon publication, the common law rights cease and protection of the work thereafter depends upon copyright under the federal statute.[4]

As required by the Constitution, statutory copyright is limited to a specified period of time; but as long as a work remains unpublished, the common law rights continue indefinitely. This and other differences between common law and statutory protection were valid when publication by printing and distributing copies was virtually the only means of disseminating works to the public at large. For most purposes, however, the rationale for protecting works on different bases before and after publication has been destroyed by the development of other methods of wide public dissemination, notably through aural recordings and broadcasting and other transmissions. The dual system was abandoned long ago by the United Kingdom and other British Commonwealth countries in favor of a unified system of statutory copyright.

Moreover, archival collections of manuscripts have become important sources of material for historians and scholars, who are often inhibited in their use of these manuscripts by the existence of literary property rights. The considerations of privacy that gave rise to the common law protection of unpublished works do not require that the literary property rights of authors in their manuscripts continue in their heirs forever, as is now the case, at least in theory, under the common law.

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[3] The fascinating evolution of this dual system in England can be traced in the celebrated cases of Millar v. Taylor, 4 Burr 2302 (K.B. 1769) and Donaldson v. Becket, 4 Burr 2408 (H.L. 1774).

[4] The American counterpart of Donaldson v. Becket, *supra* note 3, is Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). For a general discussion of the subject see Strauss, "Protection of Unpublished Works" (1957), Study No. 29 in Copyright Law Revision Studies, a series of Committee Prints of the Senate Committee on the Judiciary, 86th Cong., 1st & 2d Sess. (1960-61) [this series hereinafter cited as Copyright Law Revision Studies].

B. *Duration of Copyright*

The first copyright statute, enacted in England in 1710,[5] was designed to assure that the author or authorized printer of a work could retain, for a specified period of time after its first publication, the right to prevent others from making and publishing copies. An essential feature of the statute was the time limitation on the new post-publication right; and since the statutory right came into being upon publication, it was logical to have the time period run from that event. Ultimately the historic case of *Donaldson v. Becket*[6] decided that the statute alone, and not the common law, provided protection after publication, so that all copyright protection terminated at the end of the time period specified in the statute.

The concept of a limited period of copyright protection for authors was embedded in the Constitution of the United States,[7] and the copyright statute enacted by the First Congress in 1790[8] followed the precedent of the mother country in fixing a term of years measured from publication.

Almost immediately afterward, France, sparked by her Revolution, led the way for continental Europe in enacting decrees for the protection of the rights of authors.[9] The French pattern, unrestrained by the common law tradition, was influenced more by concern for the protection of the author as a creative individual, and less by the event of publication as a focal point. The French decrees adopted the concept of limited duration, but provided that the author's rights should endure for his lifetime.

Almost all countries, including the United Kingdom and the other members of the British Commonwealth, have since adopted a copyright term running for the life of the author and a number of years after his death.[10] The United States is almost alone in having its basic term measured still from publication.

C. *The Renewal System*

Another feature of the United States law borrowed from the English statute of 1710, and still with us, is the two-term system:

5 8 Anne ch. 19.

6 *Supra* note 3.

7 Article I, Section 8 of the Constitution empowers the Congress to secure exclusive rights to authors and inventors in their writings and discoveries "for limited times."

8 1 Stat. 124 (1790), which provided for a term of 14 years from publication, renewable for a further term of 14 years.

9 Decrees of July 19—August 6, 1791, and July 19-24, 1793.

10 See Guinan, "Duration of Copyright" (1957), Study No. 30 in Copyright Law Revision Studies.

copyright endures initially for a period of years (now 28) from the date of publication, and may be renewed by certain persons for a further period of years (also now 28).[11] Here too we are at odds with the rest of the world. Moreover, the renewal provisions of the present law have been a prolific breeder of litigation, and, in a significant number of instances, they have deprived authors or their successors of substantial benefits they would have enjoyed but for an inadvertent failure to renew in due time.

One of the major objects of the renewal system has been to give authors, or the members of a deceased author's family, an opportunity, at the end of the first term, to recapture the rights they had originally assigned to publishers and other users of their works, and to make new contracts for exploitation during the second term. The present renewal provisions have proven unsatisfactory in this respect on both sides. It has fallen short in its objective of protecting authors against unfair bargains, and it has subjected assignees to the uncertainties of gambling against the death of the author (or other prospective beneficiaries of the renewal right) during the first term. If the renewal system is to be abolished, a different device, seeking equity on both sides, will be needed to accomplish the purpose.

D. *Procedural Requirements for Protection*

Our present statute requires, as a condition of copyright protection, that a prescribed notice of copyright be placed on published copies of the work.[12] In addition, the deposit of copies as published, together with the registration of a claim of copyright, is a prerequisite to maintaining an infringement suit;[13] but, although the statute says that deposit "shall be [made] promptly" after publication, the courts have held that delaying the deposit until an infringement suit is instituted, years later, does not affect the copyright (except in a case where a formal demand for the deposit is made by the Register of Copyrights and is not complied with).[14]

The general requirement of a copyright notice in published copies has been dropped from most foreign laws, though some still call for a

[11] 17 U.S.C. § 24 (1947). For a comprehensive analysis of the renewal system see Ringer, "Renewal of Copyright" (1960), Study No. 31 in Copyright Law Revision Studies.

[12] 17 U.S.C. §§ 10, 19, 20 (1947). For a general discussion of the notice provisions see Doyle, Cary, McCannon, and Ringer, "Notice of Copyright" (1957), Study No. 7 in Copyright Law Revision Studies.

[13] 17 U.S.C. §§ 11-14 (1947). For a general discussion of the registration system see Kaplan, "The Registration of Copyright" (1958), Study No. 17 in Copyright Law Revision Studies.

[14] Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939).

notice on certain kinds of works (*e.g.*, articles in periodicals, photographs, sound recordings). However, the use of a specified form of notice as a device for international protection has been sanctioned by the Universal Copyright Convention.[15]

While author interests have recommended elimination of the notice requirement in the revision of the United States statute, the retention of such a requirement has staunch advocates, particularly among scholarly, educational and research groups. But even the latter concede that the notice provisions of the present statute are too rigid and often work injustices inasmuch as they cause forfeitures of copyright because of inadvertent or technical omissions or errors.

As for registration, few countries have a full-scale system comparable to that in the United States. The deposit of copies of published materials for the enrichment of national libraries is a common requirement in foreign countries; but, except for those countries where deposit is made in conjunction with registration, the deposit requirement is disassociated from copyright protection.

Retention of a comprehensive system of deposit and registration is favored by virtually all groups concerned in the United States, though not as a condition of copyright protection in any event. A number of changes in the operation of the present system, however, are generally thought desirable to produce a more complete and reliable record, or will be necessary to conform with changes in the general structure of the statute.

E. *The Manufacturing Clause*

A feature of the present law that his long been bitterly attacked, both at home and abroad, is the so-called "manufacturing clause". In simplified summary, it requires that English-language books and periodicals by American authors must be printed in the United States. If printed and published abroad, ad interim copyright protection for five years may be secured by a special registration, but all copyright protection ceases at the end of the five years unless another edition is printed and published in the United States in the meantime.[16]

It is difficult to see any logical reason why the copyright protection of authors should be dependent upon the domestic manufacture of copies. The present manufacturing clause is an ameliorated version of the clause as originally written into the 1891 statute[17] which provided, for the first time, for the extension of copyright to foreign works on a basis

[15] Universal Copyright Convention Art. III, para. 1.

[16] 17 U.S.C. §§ 16-18, 22, 23 (1947).

[17] Ch. 565, § 3, 26 Stat. 1106 (1891).

of reciprocity. The requirement of domestic manufacture was the political price exacted by the American printers for the withdrawal of their opposition to the international copyright provisions of the 1891 act. They feared the loss of the employment they had enjoyed in printing copies, for the American market, of foreign works which had theretofore not been protected by copyright in the United States.

The economic position of American printers, if it required their special protection against foreign competition in 1891 and for some time thereafter, has since been turned about. In the earlier years the United States was a net importer of books; in more recent years exports have greatly exceeded imports. Nevertheless, the printers still insist that, because wage rates are materially lower in other countries, they need the protection afforded by the manufacturing clause. All other groups concerned, including authors, publishers, and scholarly organizations, have urged complete elimination of the clause.

F. *Copying as Fair Use*

The development of machines that will reproduce copyrighted material quickly and in quantity has aroused much concern and controversy about the application, in this new context, of the old doctrine of fair use. And it is now evident that the same questions extend to the storage and retrieval of copyrighted material through computer systems now in process of development.

The copyright statute makes no mention of fair use; read literally, it would make any copying without permission an infringement of copyright. But the courts have recognized that a limited amount of copying, as in brief quotations, must be allowed in situations where it is a matter of routine necessity, serves a legitimate purpose, and involves no substantial encroachment upon the copyright. So the courts, in a variety of cases over a long period of time, have grafted upon the statute a judicial doctrine of fair use.[18]

By its nature, fair use is a general concept of vague dimensions. Like "due care," for example, it is a rule of reason that cannot be delineated in exact terms of quantity or quality. Its adaptability to an endless variety of circumstances has, in fact, been its great practical virtue. The courts have, however, provided some guidelines. Running through the cases are pronouncements that, in determining whether any particular use is permissible as a fair use, the principal factors to be taken into account are: the nature of the copyrighted work and the use made of it, the amount and importance of the portion used in relation

[18] The cases are reviewed in Latman, "Fair Use of Copyrighted Works" (1958), Study No. 14 in Copyright Law Revision Studies.

to the whole work, and the likelihood that such uses will affect the potential market for the work.

Although the fair use doctrine has not been confined to any particular kinds of uses, the court decisions have dealt mostly with quotations in one work from another for purposes such as criticism, comment, or illustration. Since the courts have not ruled specifically on the reproduction of material for use in schools, a group of educational organizations, in their testimony on the general revision bill introduced in 1965, expressed grave doubt about relying on the traditional doctrine of fair use to defend what they considered reasonable copying for school use. They proposed a special statutory provision to permit copying for educational purposes under certain conditions. To this the authors and publishers objected strenuously; the solution, they argued, lies in the application of the fair use doctrine.[19]

Library groups adopted the latter approach in dealing with the problem of supplying single copies of material in library collections to researchers. They, as well as authors and publishers, rejected a proposed statutory provision[20] specifying the conditions under which libraries could supply such copies, and expressed their preference for a statutory affirmation of the fair use doctrine in general terms.

G. *Broadcasting and Other Transmissions*

1. Nonprofit Performances

The present statute, being of 1909 vintage, makes no reference to radio or television broadcasting of copyrighted materials. Its provisions for the right of public performance,[21] however, enabled the courts to apply the statute to performances given in broadcasts. Thus, the old law proved to be capable of satisfactory adaptation to these new methods of presenting performances to the public until noncommercial broadcasting assumed a role of large and growing importance in the dissemination of copyrighted materials.

The legislators of 1909, thinking of such things as the free concerts

[19] The positions taken by the various groups are reflected in the Hearings on Copyright Law Revision Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pts. 1-3 (1966). Testimony on any particular subject or by any particular person or organization can be located from the index at the end of Part 3 of the Hearings.

[20] "Preliminary Draft for Revised U.S. Copyright Law § 7," in Copyright Law Revision, pt. 3, at 6 (Comm. Print, House Committee on the Judiciary, 88th Cong., 2d Sess. 1964).

[21] 17 U.S.C. § 1(c)-(e) (1947). The statutory provisions and case law on the right of public performance are reviewed in Varmer, "Limitations on Performing Rights" (1958), Study No. 16 in Copyright Law Revision Studies.

given in the public park on Sunday evenings, excluded from the public performance right those performances of music that were not "for profit." Likewise, when the statute was amended in 1952 to extend the performance right to embrace the public reading or recitation of nondramatic literary works (poems, essays, lectures, etc.), the right with respect to those works was limited to public performances "for profit" in order to exclude such recitations as those given at school, church, or civic assemblies.

The "for profit" limitation, enacted as a minor and inconsequential exception to the public performance right, began to loom large with the recent and prospective growth of "educational" and other noncommercial broadcasting stations. More and more, the performances in noncommercial broadcasts are reaching a vast audience, which may in fact be the principal audience for some kinds of works, or may be much the same audience as the commercial broadcasters would reach with the same or similar material. In short, noncommercial broadcasters have become an important sector of the market for copyrighted works, and their complete exemption, under the "for profit" limitation, from any obligation to pay for the use of copyrighted material is hard to justify.

2. Reproduction Through Image Transmissions

Television—that is, the transmission of images—has created a new problem that the old law could be construed to cover only by stretching it to the breaking point. By means of television, anything visually perceptible—textual matter in books, musical scores, pictures, art works—can be reproduced in the form of images presented for viewing by public audiences of any size in any number of places. In principle, in regard to the rights of authors in the exploitation of their works, the public display through image reproduction of a work whose function lies in its visual perception may be considered the equivalent of public performance of a work whose function lies in being so performed, or may even be considered the equivalent of supplying copies of the work for temporary use by the viewers.

How the present law might apply to such public displays is somewhat conjectural. The display of a visual image is hardly a "performance" in any established meaning of that term. The projection of an image might conceivably be treated as making a copy,[22] but an evanescent image lacks the element of durable fixation that is tradi-

[22] Projection of a motion picture was held to infringe the right to "copy" in Patterson v. Century Productions, 93 F.2d 489 (2d Cir. 1937), *cert. denied,* 303 U.S. 655 (1938).

tionally assumed to be inherent in the law's use of the word "copy." Moreover, the circumstances in which visual material is displayed may call for different qualifications from those provided for either performance or copying. The right of public display needs to be dealt with on its own merits in a revision of the law.

3. Community Antenna Systems

An issue that has only recently demanded attention concerns the retransmission of television broadcasts by so-called community antenna (CATV) systems. These systems pick up broadcasts on high antennas, and relay them, through amplifiers and a web of cables, to the receiving sets of individual subscribers. Originally CATV systems were designed to bring local broadcasts into the pockets where reception was blocked by mountains or other conditions of terrain. They spread next into areas where reception was limited, or of poor quality, for lack of nearby broadcasting stations. The concern of copyright owners, as well as of broadcasters, became acute when CATV began to bring programs from distant stations into areas served by local stations, thereby diverting some of the local station's audience and, in consequence, diminishing the value of copyright licenses to the local station.

CATV operators took the position that their retransmission of the copyrighted material in broadcasts was not subject to copyright since they were doing nothing more than furnishing antenna equipment to their subscribers. The copyright owner of a number of motion pictures brought suit for infringement on the ground that CATV retransmissions of broadcasts of their motion pictures constituted public performances under the present copyright law. In a seventy-six page opinion, Judge Herlands of the U.S. District Court for the Southern District of New York sustained the contention of the copyright owner.[23] An appeal from his decision is now pending.

There are thought to be sound reasons of equity and public policy for treating CATV retransmissions differently in various situations. For example, the impact of CATV on the value of a copyright license to a local broadcaster is quite different in the situation where the CATV augments the broadcaster's audience by bringing its programs into local areas blocked out by the terrain, than it is in the situation where the CATV takes away the broadcaster's audience by importing the same programs from distant stations. Judicial application of the present law, however, seems certain to mean that CATV systems are fully liable in all cases if Judge Herlands' decision is upheld, or that they are

[23] United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).

not liable in any case if he is reversed. Any intermediate solution that would differentiate between various situations would appear to call for legislative formulation, and such a solution has been proposed as part of the revision of the copyright law.[24]

H. *Computer Uses*

Is the development of computer technology for storing and reproducing documentay material, coupled with transmission systems for reproduction at a distance, about to usher in something really new under the sun? Or is the outgrowth of this technological marvel to be foreseen as just another, much faster way of doing the same things that publishers and libraries, for instance, have been doing by more traditional methods?

These questions, of course, will not bring forth categorical answers, but they may serve to indicate the wide range of prophetic thinking that colors discussions of copyright in relation to computer-based systems for storing and communicating information. The copyright problems in this area are themselves not clearly defined as yet; what the nature of computer-based systems will be, and what uses they will make of copyrighted material in the future, can now only generally be predicted.

Some broad aspects of future probabilities, however, seem fairly apparent. For example, however effective the new machines may eventually be in communicating verbal, pictorial, and aural expressions of thought instantaneously to almost everybody, the creation of those expressions is still expected to depend upon the work and skill of human authors. Similarly, even though the publishers' functions with respect to the distribution of copies may be performed through the medium of a computer-based system of reproduction and transmission, some of their other functions—planning and commissioning works, evaluating manuscripts and editing them—require human ingenuity and judgment of a creative order. In short, computer-based systems of dissemination will not affect the fundamental rationale of copyright; they will not eliminate the need to provide an economic base that will enable authors and publishers (whether of the present or a new breed) to devote their time and resources to the production of the material to be so disseminated.

Insofar as computer uses of copyrighted materials are comparable in purpose and effect to uses by other, more familiar means—including reproduction by copying machines and transmission by broadcasting—the copyright principles found through experience to be appropriate for

[24] See *infra*, notes 80-83.

such other means of use may be presumed to be appropriate also for similar uses by computer systems. Thus, it may be presumed that if reproduction by traditional methods is subject to copyright, the same reproduction by means of a computer should be also; and that whatever is permissible as fair use in copying by other devices should be fair use when done by a computer.

It may be that future developments in computer technology will bring about such new uses of copyrighted materials as will require a special set of new copyright rules. But it is not yet evident that the rules of general applicability based on uses and devices known heretofore will not be appropriate for adaptation to computer uses.

I. *Mass Licensing*

The planning of projects for the development of computer-based networks for communicating information has given further emphasis to a practical problem that began to arouse serious attention a few years ago in the context of the rapidly growing use of more and more efficient photocopying machines. The problem is that of licensing the use of copyrighted materials on a mass basis, so that users will have ready access to the whole catalog of works and the copyright owners will be compensated for the use of their respective works. The mass licensing systems that have existed for many years in the field of music[25] might serve as prototypes for organizations dealing with other kinds of works. Several groups have begun working on plans for establishing a mass-licensing system for a broad range of books and periodicals. They are approaching the problem as one calling for voluntary action by the groups concerned rather than legislation.

J. *The Jukebox Exemption*

No summary of the issues requiring attention in a revision of the copyright law could purport to cover the highlights without some mention of the present exemption of musical performances by means of coin-operated machines.[26] This "jukebox" exemption was written into the 1909 law in the closing days of the lengthy legislative proceedings, as a rather casual addition, apparently thought to be of little significance, to a final compromise on the major issue of the extension of copyright to the mechanical recording of music.

[25] Virtually all copyrighted music is licensed for public performance in bulk by three organizations, the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. Each organization issues licenses covering its entire catalog of music at a total annual fee.

[26] 17 U.S.C. § 1(e), last sentence.

The complete exemption of what has since grown into a half-billion-dollar industry, whose sole business is the public performance of music, has been recognized as an unjust anomaly by virtually everyone except the jukebox industry itself. It is frequently cited by the copyright owner groups as the horrible example when they argue against new proposals to exempt some particular use from copyright.

Special bills for the repeal of the exemption have been introduced in Congress repeatedly during the past twenty years, and several of them have been the subject of Congressional hearings.[27] The jukebox operators have pleaded that their industry has been based on the exemption, and that the economic situation of most operators would not allow them to pay more than a small sum as copyright royalties.

II. Revision in Process

The current project for general revision of the copyright law has been especially notable in two respects: (1) Few legislative measures have had the thorough, patient study and discussion that went into the almost ten years of preparatory work which preceded the introduction in 1965 of a revision bill for Congressional consideration; (2) The dedicated and perceptive devotion of a full panel of the House Judiciary Subcommittee to twenty-two days of hearings on the bill, and thereafter to fifty-one executive sessions at which the Subcommittee made a painstaking review and analysis of every issue raised during and after the hearings, is a model of the legislative process at its best.

A. *Preparatory Work*

The revision project began in 1955, under a Congressional authorization, with a program of studies inspired by the late Arthur Fisher, then Register of Copyrights, and carried out in consultation with an advisory panel of specialists broadly representative of the various groups for whom copyright is a matter of major concern. The planning of a program of studies on the important substantive issues, and of conferences with all interested groups, a process that would obviously take several years, was prompted by the hope that most of the controversies, including a number that had frustrated the continuous

[27] Among others, Hearings on H.R. 5921 Before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess., ser. 6 (1959); Hearings on H.R. 5174 Before Subcommittee No. 3 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 2 (1963). On the basis of the latter hearings a further bill, H.R. 7194, was favorably reported by the House Judiciary Committee: H.R. Rep. No. 733, 88th Cong., 1st sess. (1963).

efforts made between 1924 and 1940 to revise the 1909 law,[28] could be resolved before a bill was presented to Congress for its consideration.

Thirty-four studies were prepared by or under the direction of the Copyright Office, ranging over the broad field of the major issues that required attention in reconstructing the existing law. They were designed to present objectively, with respect to each of the topics covered, the history and status of the present law, the problems being encountered under the present law, the pertinent law in other countries, and an analysis of the issues and suggested solutions. The thirty-four studies, together with comments and views submitted by the members of the advisory panel, were published in a series of pamphlets issued in 1960 and 1961 by a subcommittee of the Senate Committee on the Judiciary.[29]

A Report of the Register of Copyrights, based on the studies and making tentative recommendations as to the substantive provisions to be incorporated in a draft of a revision bill, was in the process of preparation when Arthur Fisher died rather suddenly near the end of 1960. The Report was completed under his successor, Abraham L. Kaminstein, the present Register of Copyrights. It was submitted to the Congress in July 1961, and was printed that same month by the House Committee on the Judiciary.[30]

The new Register of Copyrights brought fresh impetus to the program begun by his predecessor. His Report to the Congress was widely distributed with an invitation to all persons concerned to submit comments and suggestions, and during the following eight months he convened four meetings of an enlarged panel of copyright specialists for a critical discussion of the tentative recommendations advanced in the Report. The transcript of the discussion at those meetings and a substantial volume of comments submitted in response to the general invitation were published by the House Committee on the Judiciary in February 1963.[31]

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[28] These earlier efforts to revise the law are reviewed in Goldman, "The History of U.S.A. Copyright Law Revision from 1901 to 1954" (1955), Study No. 1 in Copyright Law Revision Studies.

[29] The thirty-four studies and a subject index were issued in a series of twelve Committee Prints under the running title of Copyright Law Revision Studies (Senate Committee on the Judiciary 86th Cong., 1st & 2d Sess., 1960-61). Among the thirty-four studies are those referred to in notes 4, 10, 11, 12, 13, 18, 21, and 28, *supra*, and notes 55, 56, 87, 89, 91, and 95, *infra*.

[30] Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the Copyright Law (Comm. Print, House Committee on the Judiciary, 87th Cong., 1st Sess. 1961).

[31] Copyright Law Revision, Pt. 2 (Comm. Print, House Committee on the Judiciary, 88th Cong., 1st Sess. 1963).

The Copyright Office proceeded next to prepare a preliminary draft of provisions in legislative language for incorporation in a revision bill. In a number of important respects the preliminary draft differed in substance from the tentative recommendations in the Register's Report; these changes reflected the analysis and consideration by the Register and his staff of the many suggestions offered in the discussions and comments on the Report. The preliminary draft, in turn, was subjected to discussion in detail by a further enlarged panel of specialists at eight meetings convened over a period of a year, and was circulated to other interested persons for their comments. The transcript of those eight meetings and the comments received were published by the House Committee on the Judiciary in two prints issued in July and December 1964.[32]

The response to the preliminary draft was encouraging. A consensus appeared to be taking shape on many of the issues that had been sharply controversial, and while there were still a number of conflicts on essential points, the contending groups were manifesting their willingness to seek mutual accommodations or to consider compromises.[33] In this hopeful atmosphere the process of formulating proposals and eliciting discussion among interested persons was carried out once more. In the light of the views expressed on the preliminary draft, the Copyright Office prepared a new draft in the form of a complete bill, which was introduced in the Congress in July 1964,[34] as a basis for a final round of meetings, comments, and suggestions.

The discussions and comments on the 1964 draft bill, which were printed by the House Judiciary Committee in September 1965,[35] pointed the way to the conclusion of the preparatory work. The Copyright Office drafted and submitted the bill that was introduced on February 4, 1965—as H.R. 4347 and S. 1006 in the 89th Congress—for Congressional consideration. The Register of Copyrights also submitted, in May 1965, his Supplementary Report explaining the provisions of the bill in detail, which the House Judiciary Committee published that same month.[36] The next phase of the revision project—Congressional hearings on the bill—was now about to begin.

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32 Copyright Law Revision, pts. 3 & 4 (Comm. Prints, House Committee on the Judiciary, 88th Cong., 2d Sess. 1964).

33 In any adequate history of the revision effort, a full chapter could well be devoted to the vital contributions made by many members of the bar and of industry and scholarly groups, in meetings and conferences among themselves and with the Copyright Office, toward resolving knotty problems and reconciling conflicts.

34 H.R. 11947 and S. 3008, 88th Cong., 2d Sess. (1964).

35 Copyright Law Revision, pt. 5 (Comm. Print, House Committee on the Judiciary, 89th Cong., 1st Sess. 1965).

36 Copyright Law Revision, pt. 6 (Comm. Print, House Committee on the Judiciary, 89th Cong., 1st Sess. 1965).

B. *Congressional Proceedings*

As already noted, the revision project was inaugurated by a Congressional authorization of the study program in 1955. The studies produced under that program were published by the Senate Committee on the Judiciary in 1960 and 1961, and the subsequent reports of the Register of Copyrights, as well as the discussions and comments on the successive proposals and drafts, were published by the House Committee on the Judiciary between 1961 and 1965. In both houses the Judiciary subcommittee in charge of copyright matters maintained its interest in the revision project and kept in touch with the developments throughout the course of the preparatory work.

In his 1961 Report, the Register of Copyrights had recommended that the term of copyright be lengthened in the revision bill and, more particularly, that twenty years be added to the renewal term of all subsisting (as well as future) copyrights. This recommendation to extend the renewal term of subsisting copyrights gained general approval and, on the premise that a general revision bill providing for such an extension would eventually be enacted, Congress passed a joint resolution, approved September 19, 1962, which preserved until December 31, 1965, those copyrights subsisting in their renewal term on the date of approval that would otherwise expire before December 31, 1965.[37] When it became apparent that adoption of a general revision bill would not be accomplished by the end of 1965, renewal copyrights that would otherwise expire in the meantime were extended until December 31, 1967, by another joint resolution approved August 28, 1965.[38]

Congressional consideration of the 1965 bill for general revision began on May 26, 1965, with the opening of hearings on H.R. 4347 (and other identical bills) before Subcommittee No. 3 of the House Committee on the Judiciary. The hearings continued for twenty-two days through September 2, 1965; the record of the hearings, as printed in three volumes, covers more than 1900 pages.[39] The hearings were remarkable, not only in length and thoroughness, but more strikingly for the constancy and devoted interest of the members of the Subcommittee—both the majority members led by Representative Robert W. Kastenmeier who served as chairman of the Subcommittee, and the minority members led by Representative Richard H. Poff—for their

[37] P.L. 87-668, 76 Stat. 555 (1962).

[38] P.L. 89-142, 79 Stat. 581 (1965).

[39] Hearings on Copyright Law Revision Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, pts. 1-3 (1966).

grasp of the complex issues and their penetrating questions and observations, and for the atmosphere of searching objectivity maintained by them throughout.

Even more extraordinary was the dedicated manner in which the members of the Subcommittee thereafter devoted so many of their busy hours to considering the provisions of the bill in the light of the hearings, and their determined commitment to working out the best possible bill. At the request of the Subcommittee, the Copyright Office collaborated with the Subcommittee's staff in presenting summations of all the suggestions and arguments advanced during and after the hearings for amendment of the bill. Between February and September of 1966 the Subcommittee met in fifty-one executive sessions (probably some kind of record), at which it weighed the arguments on every suggestion put forward, and decided upon the amendments to be adopted.[40]

The Subcommittee reported the bill (H.R. 4347) with its amendments to the full Judiciary Committee on September 28, 1966, and the full Committee in turn, on October 12, 1966, approved the amended bill and submitted its Report in which some 130 pages are devoted to a detailed analysis and discussion of the bill, section by section.[41]

The Committee amendments were fairly numerous and some of them were of major importance. On the whole, however, the basic framework of the bill as introduced remained intact.

There was no time during the few remaining days of the 89th Congress for further action on the bill. The 90th Congress may be expected to proceed from where the 89th left off.

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[40] On August 9, 1966, when the series of executive sessions were nearing their end, Mr. Kaminstein, in speaking at a luncheon meeting of the American Bar Association's Section of Patent, Trademark and Copyright Law in Montreal, observed:

> As things now stand, and make no mistake about this, most of the members of the Subcommittee know more about the copyright law than the majority of the people in this room, and they know a good deal more about the revision bill than most copyright lawyers.

[41] H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966).

On the Senate side in the 89th Congress, the Subcommittee on Patents, Trademarks, and Copyrights of the Judiciary Committee held initial hearings on S. 1006 (identical with H.R. 4347) for three days in August 1965. After that the Senate Subcommittee apparently decided to defer any further hearings until the House Subcommittee had completed its work on the bill. In response to a special request by community antenna television operators, who began seeking legislative relief from Judge Herlands' decision in United Artists Television, Inc. v. Fortnightly Corporation, 255 F. Supp. 177 (S.D.N.Y. 1966), the Senate Subcommittee held hearings for three days in August 1966 confined to the question of CATV liability under S. 1006.

III. The Pending Revision Bill

At the time of this writing (January 1967) the 90th Congress has just opened, and the copyright law revision bill (H.R. 4347) as amended and reported by the House Judiciary Committee near the close of the 89th Congress has been introduced as H.R. 2512 and S. 597 in the 90th Congress. It is the bill in this latest form, the product of eleven years of concerted efforts, to which we now turn our attention. It is not possible, within the compass of this article, to deal with all of the important provisions of the bill, or even to review all of the significant changes it would effect in the present law. All that will be essayed here is a summary of the bill's treatment of the main issues calling for new departures from the present law.

A. *Coverage Under the Statute*

Some of the more radical innovations of the bill relate to the coverage of works of authorship under the copyright protection afforded by the federal statute. Here the bill reaches into new ground in three respects: (1) in its coverage of works in their unpublished state; (2) in its coverage of works fixed in new forms or by new techniques, including any now unknown that may be developed in the future; and (3) in its coverage of new kinds of works.

1. Unpublished Works

Instead of the present dual system of common law protection before publication and statutory copyright thereafter, the bill would institute a single federal system of copyright protection for works of authorship as soon as they are created, *i.e.*, as soon as they are "fixed in any tangible medium of expression."[42] Thus, unpublished works that now depend for their protection upon the common law (or the rare statutes) of the several states would be protected instead by copyright under the federal statute. Federal copyright protection would apply automatically upon creation (i.e., fixation) of the work; within the area of federal protection, any equivalent protection under state law would be pre-empted.[43]

State law would be left in effect, however, with respect to unpublished material of any kind that is not subject to copyright protection under the federal statute. This would embrace material that does not qualify as a "work of authorship" under the statute (of which

[42] The bill provides that "Copyright in a work . . . subsists from its creation," § 302(a). A definition in § 101 specifies that "A work is 'created' when it is fixed in a copy or phonorecord for the first time."

[43] Pre-emption is provided for in § 301.

typography, most industrial designs, and products of mechanical operations might be examples), and material in the nature of a "work of authorship" that is not "fixed in any tangible medium of expression" (of which impromptu speeches, musical or choreographic improvisations, and broadcast emissions might be examples).[44]

Also, the pre-emptive effect of the federal statute would not intrude upon causes of action under state laws relating to rights that are not equivalent to copyright, though they may involve copyrighted material. As examples of such causes of action, the bill mentions "breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation."[45]

2. Works in New Forms

The advent of each new physical form in which works are fixed has been a recurrent source of difficulty or uncertainty as to the application of the copyright statute to a work in that form. Thus, music fixed only in an aural recording (which is characteristic of "concrete" and "electronic" music) is still considered ineligible for copyright protection under the present statute; to become eligible to music must be written in some form of visual notation.[46] When a series of pictures that would undoubtedly have constituted a copyrightable "motion picture" if fixed on film was fixed instead on the newly developed videotape, there were differing views for a time as to its copyrightability. And even now the copyrightability of "literary" material incorporated in a computer program on magnetic tape or punched cards is considered debatable, though there would be no doubt about the same material in a printed book.[47]

Questions of this character have arisen from a failure to differentiate between the intangible work itself (*i.e.*, the author's intellectual creation which is the true object of copyright protection) and the tangible form in which the work is fixed and from which it can be perceived or made perceptible. To a large extent this confusion may be traced to the historical identification of works in terms of the "copies" in which they were reproduced and published. Thus, the copyright statutes have traditionally referred to "books" in specifying the subject matter of copyright, rather than to the literary, pictorial, or other

[44] Section 301(b)(1).

[45] Section 301(b)(3).

[46] The Copyright Office will not accept aural recordings in fulfilment of the requirement in 17 U.S.C. §§ 12-14 that "copies" be deposited for registration.

[47] The Copyright Office has registered copyright claims on motion pictures embodied in videotape and on literary material incorporated in computer programs.

content that constituted the copyrightable work of authorship. In the much-cited case of *White-Smith Music Publishing Co. v. Apollo Co.*,[48] decided shortly before the passage of the 1909 Copyright Act, the Supreme Court held that the exclusive right of the copyright owner of a musical work to make "copies" did not extend to the making of piano rolls from which the music could be played but not read, since "copies" meant reproductions of the work in a visually perceptible form. And the 1909 Act as codified in the present law (though it overturned the result of *White-Smith* by providing specifically for the right to make any form of "record" from which the work could be reproduced) still reflects some confusion between works and the physical forms in which they are embodied. It continues to specify categories of copyrightable works in terms of "books," "periodicals," and "prints," among others,[49] and it requires that "copies" (a term for which no definition is given to repudiate the premise stated in *White-Smith*) must be deposited for copyright registration.[50]

The revision bill would put an end to this conceptual confusion. It covers all "original works of authorship" that are fixed "in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[51] Moreover, in its illustrative list of "works of authorship," the bill characterizes the works according to their intrinsic nature (*e.g.*, "literary works") rather than the physical forms of their fixation.[52] There would thus be no doubt about the coverage under the bill of a musical composition embodied in a tape recording, or a motion picture fixed on videotape, or a literary work embodied in a computer program on punched cards, or of any work of authorship eligible for protection that might hereafter be fixed in some new form now unknown.

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48 209 U.S. 1 (1908).

49 17 U.S.C. § 5 (1947).

50 17 U.S.C. §§ 12-14 (1947).

51 Section 102, first sentence. This is buttressed by the definitions in § 101, which state that a work may be "fixed" in either "copies" or "phonorecords," and which define the latter two terms as including between them all "material objects" in which a work is fixed "by any method now known or later developed," and from which the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

52 Section 102, second sentence. In its definitions of categories of works, the bill cites as examples various physical forms in which the works may be embodied. Thus, the definition in § 101 of "Literary works" includes the phrase "regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied."

3. New Kinds of Works

The bill lists seven categories of protected works,[53] the first six of which are designed to include all of the works embraced within the thirteen classes enumerated in the present statute.[54] Thus, all of the kinds of works now eligible for copyright protection would continue to be protected. And one of the first six categories in the bill—"pantomimes and choreographic works"—would be an expansion of the corresponding class covered by the present law since such works must now be "dramatic" to qualify for copyright.[55]

The seventh category of protected works named in the bill—"sound recordings"—is entirely new.[56] A work of this category consists of the concatenation of actual sounds fixed in, and capable of aural reproduction from, some form of "phonorecord." The recorded sounds that constitute, in combination and in sequence, a "sound recording" are most commonly derived from musical instruments or human singing or speech; but they may be also derived from nature (*e.g.*, bird calls), from machines (*e.g.*, train whistles, racing motors, or electronic devices) or from any other source.

A sound recording as a work in itself is separate and distinct from the musical composition (or literary work) of which a particular rendition is recorded. The distinction becomes clearer when it is remembered that a musical composition is an intellectual conception created by its composer and usually exists before and independently of any recording, while a sound recording is made by capturing a series of actual sounds which are produced, where a musical composition is being used, by performers, or which may consist of sounds other than music. A sound recording as a work must also be distinguished from the "phonorecord" in which it is embodied, the distinction being parallel with that between a literary work and the book in which it is embodied.

With these distinctions in mind, it will be evident that a phonorecord may embody both a musical composition and a sound recording as two separate works; and even where the musical composition is in

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[53] Section 102.

[54] 17 U.S.C. § 5 (1947).

[55] The present law does not mention pantomimes or choreographic works. They may qualify if they come within the class of "dramatic or dramatico-musical compositions" specified in 17 U.S.C. § 5, but whether modern "abstract" dances would so qualify is questionable. See Varmer, "Copyright in Choreographic Works" (1959), Study No. 28 in Copyright Law Revision Studies.

[56] For a discussion of the protection of sound recordings, see Ringer, "The Unauthorized Duplication of Sound Recordings" (1957), Study No. 26 in Copyright Law Revision Studies.

the public domain, as in the case where a performance of a Beethoven sonata is recorded, the sound recording may be subject to copyright.

While recognizing sound recordings as works protected by copyright for the first time, the bill would limit the rights granted to the copyright owner. He would be given only the exclusive rights to reproduce the sound recording and to distribute reproductions of it to the public.[57] Reproduction here means duplication of the actual sounds fixed in the protected recording. The copyright would not preclude other persons from making other recordings of similar sounds, such as those produced by another performance that imitated the one fixed in the protected recording.

Of particular importance to the various users of recorded music, including broadcasters and the operators of jukeboxes and other music services, is the express denial in the bill of any exclusive right in the copyright owner of a sound recording to use it in giving public performances.[58] Under the present law the performance right of the copyright owners of musical or literary works extends to peformances by means of phonorecords, and the bill states explicitly that their performance right continued unimpaired.[59]

B. *Duration:*

1. Future Copyrights

The change wrought by the revision bill that is probably the most significant in the minds of authors generally is the adoption of the basic term of copyright prevalent in most other countries: a single term enduring for the life of the author and fifty years after his death.[60] In most instances this term will be substantially longer than the two terms totaling fifty-six years after publication provided by the present law; however, for the relatively small number of works published posthumously (or very shortly before the author's death), the new term will be shorter; and for works that remain unpublished, it will put a terminus to protection that now continues indefinitely.

The life-plus-fifty-years term cannot be applied universally. In the cases of anonymous and pseudonymous works, as well as of "works made for hire" (which are usually produced and issued in the name of an organization), there is ordinarily no identified author upon whose life the term can be measured. For these works the bill (§ 302(c)) provides a term of seventy-five years after publication, based upon a study

[57] Section 114.
[58] Section 114(a).
[59] Section 114(c).
[60] Section 302.

indicating that this period is roughly equivalent on the average to fifty years after the author's death.[61] And still another term is needed for works of unidentified authors that remain unpublished for a long time; so the bill (§ 302(c)) provides for a term of one hundred years from creation of the work if that is shorter than seventy-five years from publication.

Because of the persistent doubt that the death date of obscure authors could be readily ascertained, the bill contains a novel qualification on the life-plus-fifty-years term. The Copyright Office is to maintain a record of authors' death dates and, unless the record shows otherwise, it may be presumed, after a period of seventy-five years from publication or one hundred years from creation of the work, that an author has been dead for fifty years.[62]

2. Subsisting Copyrights

The foregoing term provisions would apply only to copyrights that come into existence after the new law becomes effective. Copyrights now subsisting are so often the subject of contracts and vested or future interests based upon the renewal system of the present law that it was felt essential to retain that system for them. Hence, subsisting copyrights would continue under the bill to have a first term of 28 years from publication and to be subject to renewal by the persons specified in the present law; but the renewal term would be lengthened from the present twenty-eight years to forty-seven years, making the total of the two terms seventy-five years from publication (and so equivalent to the term for future copyrights).[63]

3. Termination of Author's Assignment

In lieu of the opportuntiy afforded to authors (or the dependents of deceased authors) under the present renewal system, to recapture their previously assigned copyrights at the end of the first term of twenty-eight years, the bill gives them the option to terminate their assignments by serving a notice in advance after thirty-five years (or up to forty years in certain cases) from the execution of the assignment.[64] This is designed to enable the author (or his surviving family)

[61] The results of this study are summarized in the 1961 Report of the Register of Copyrights, *op. cit. supra* note 30, at 50.

[62] Sections 302(d)-(e).

[63] Sections 304(a)-(b). To assure that existing contracts and interests based upon the present renewal system will not be disurbed, § 304(a) of the bill duplicates the language of the present 17 U.S.C. § 24, except for changing the length of the renewal term from 28 to 47 years.

[64] Section 203 provides for termination of transfers and licenses executed by au-

to renegotiate contracts of assignment made when he was in a disadvantageous bargaining position and when the economic value of his work was conjectural.

C. *Notice of Copyright*

The bill retains the requirement, firmly established for so long in our copyright law, that a prescribed notice of copyright must be placed on all published copies of the work.[65] The bill makes major changes in the notice requirement, however, by relaxing its present rigidity and ameliorating the harsh consequences of omissions and errors.

Where omission of the notice will now result in the irretrievable loss of copyright, the bill would preserve the copyright if a registration is made before or within five years after copies have been published without the notice.[66] The notice requirement would be given force at the same time, however, by absolving from liability for damages any innocent infringer who is misled by the absence of the notice.[67]

Similarly, if a person who is not the actual owner is named in the notice, the copyright may be forfeited under the present law. Here, too, the bill would preserve the copyright, but would protect from liability innocent infringers who act in good faith in reliance upon the apparent ownership of the person named in the notice.[68] The rule regarding the wrong name in the notice may be crucial, for example, in the situation where the author of a contribution to a magazine wishes to retain the copyright in his article, while the only notice in the magazine relates to its contents as a whole and is in the name of the publisher. The bill makes special reference to this latter situation.[69]

Copyrights are now put in jeopardy if the notice is placed in a position other than one specified precisely by the present law. The bill adopts the approach taken in the Universal Copyright Convention by allowing the notice to be placed "in such manner and position as to give reasonable notice of the claim of copyright."[70]

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thors after the new law becomes effective. Section 304(c) provides for termination, with respect to the 19-year period added to the renewal term of subsisting copyrights, of transfers and licenses executed before the effective date of the new law.

[65] Section 401. A similar notice requirement is added by § 402 for the new category of sound recordings.

[66] Section 404(a).

[67] Section 404(b).

[68] Section 405.

[69] Section 403.

[70] Section 401(c), which provides further that placement of the notice in accordance with regulations to be prescribed by the Register of Copyrights will satisfy the requirement.

D. *Uses Subject to Copyright*

1. In General

The bill specifies, as exclusive rights of the copyright owner, the four broad ways of exploiting works that are designated in the present statute: (1) their reproduction in copies or phonorecords, (2) their use as the basis for derivative works, (3) the publication of copies or phonorecords, and (4) their public performance. In addition, the bill provides explicitly for the exploitation of works through public display, a method to which television has given new importance but which the present statute leaves in a nebulous state. The most significant provisions of the bill in regard to these various methods of use are those specifying exemptions from, and limitations on, these exclusive rights of the copyright owner.[71] Some of the more important exemptions and limitations will be summarized (and somewhat oversimplified) here.

2. Fair Use

The bill contains, for the first time, a statutory recognition of the doctrine of "fair use" which has evolved in a line of judicial pronouncements. The doctrine (that certain limited uses of copyrighted material are freely permissible as "fair use") has important applications in virtually every area of use. In framing the revision bill the limits of fair use became the center of sharp controversy in the context of reproducing material for use in schools. After much shifting and hauling in attempts to draft a statutory formulation of what is innately a doctrine of imprecise dimensions, the bill finally arrived at a statement[72] which, as supplemented by explanatory examples in the legislative report of the House Judiciary Committee,[73] seems to have resolved the controversy.

The bill recognizes explicitly that, within the bounds of fair use generally, copying (as well as other uses) "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research" may be fair use. This is not, of course, an exhaustive list of the purposes to which the doctrine may be applied. The bill then states four main factors, which are a crystallization of the criteria gleaned from the court decisions, to be considered in determining whether any particular use is pemissible as a fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and sub-

[71] The exclusive rights are stated in all-embracing terms in § 106; the exemptions and limitations are then specified in §§ 107-116.

[72] Section 107.

[73] H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 58-66 (1966).

stantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

3. Nonprofit Performances

In general, the bill continues the present law's exemption from copyright of public performances of nondramatic musical and literary works that are given in the presence of the audience with no element of profit-seeking involved.[74] But the bill repudiates the extension of this exemption to all noncommercial broadcasts of such works, which is believed to be the effect of the broad language used in the 1909 law. Instead, the bill distinguishes generally between instructional broadcasts that noncommercial educational stations provide for reception primarily in schools (or by students unable to attend classes) as part of the schools' regular instructional activities, and cultural or entertainment programs broadcast by those or other stations for reception by the general public. Subject to certain qualifications, the former are exempt[75] while the latter are not.

4. "Ephemeral Recordings"

Taking a leaf out of foreign laws and, to some extent, giving sanction to a common practice, the bill contains a new provision permitting a broadcaster, when he is authorized to broadcast a work, to make a single recording (aural or visual) of the program including the work for the purpose of later authorized broadcasts. The recording could be used only for broadcasts made by that particular broadcaster within six months after the first such use.[76] Special rules for instructional broadcasts to schools by noncommercial educational stations would permit

[74] Section 110(4). The exemption does not apply if compensation for the performance is paid to any performer, promoter, or organizer. The charge of an admission fee will not of itself negate the exemption if the net proceeds are used exclusively for eleemosynary purposes.

The bill also provides specifically for the exemption of performances and displays made by instructors or pupils in the course of classroom teaching (§ 110(1)), and those made in the course of church services (§ 110(3)).

[75] Section 110(2). The exemption applies to performances of nondramatic literary or musical works, and displays of any kinds of works, in such instructional broadcasts made by a governmental body or other nonprofit organization. In order to exclude national and wide regional network broadcasts, § 110(2) limits the exempt broadcasts to those that are not normally received beyond a radius of 100 miles. Also specifically excluded from the exemption are transmissions from an information storage and retrieval center which are activated by the recipients.

[76] Section 112(a). The recording could be preserved solely for archival purposes after the six months; otherwise it would be destroyed.

a recording made by one such station to be used for such broadcasts by itself or any other such station within one year after its first use.[77] For the making or use of recordings beyond the limits allowed by this statutory exemption, authorization by the copyright owner would be necessary.

5. Public Displays

Broadly speaking, the bill would subject the right of public display to much the same exemptions and limitations as the right of public performance. Any person who owns a lawfully made copy of a work (including the original of a work such as a painting) would be entitled to display it for viewing by the public at the place where the copy is located.[78] This would permit display of the copy in a public gallery or show window, for example, but would not permit display of the work in a broadcast or other television transmission to the public. In general, in those situations where television performances are permitted—*e.g.*, in noncommercial instructional broadcasts for schools, in the public reception of television broadcasts on a single home-style receiver, and in certain retransmissions of television broadcasts—television displays are likewise permitted.[79]

6. Retransmissions by Community Antenna Systems

On the hotly disputed issue of CATV liability for the retransmission of broadcasts of copyrighted works, the bill stands in the middle between the initial contention of copyright owner groups for full liability and the initial plea of CATV systems for complete exemption. Subject to certain conditions that would deny any exemption to a CATV system engaged in transmission activities other than relaying broadcasts,[80] the bill would exempt CATV retransmissions that are confined within the area normally expected to be reached by the broadcast itself;[81] this pertains particularly to the pockets in the area which are cut off from receiving the broadcast by the terrain or other physical obstructions. In an area that is not "adequately served" (one not receiving through local broadcasting stations most of the national networks' programs) a CATV system would be given a compulsory li-

[77] Section 112(b). For such instruction broadcasts (which are exempt under § 110(2) as to the rights of performance and display), the noncommercial station could make a duplicate recording for security and archival preservation.

[78] Section 109(b). The display could be made either by showing the copy itself or by projecting a single image of it.

[79] See §§ 110(2), 110(5), 111(a).

[80] Section 111(b)(1)-(4).

[81] Section 111(a)(3).

cense, for which it would have to pay a "reasonable license fee," to bring into the area a broadcast from an outside station, except where the CATV had been notified that the same program is licensed exclusively to a local station for that area.[82] In other cases—in an "adequately served" area, or where the CATV had been notified of a local station's exclusive license—CATV retransmission of a broadcast from an outside station would be fully subject to copyright.[83]

7. Jukebox Performance of Music

The bill would end the jukebox exemption under the present law; but it would give jukebox operators a compulsory license, for which the operator would have to furnish periodically information identifying his machines and the musical works placed in them, and would have to pay a royalty fixed in the statute.[84] As in any other case, the operators could negotiate with the copyright owners for licenses on any terms they agree upon, instead of invoking the compulsory license under the statutory conditions.

E. *Miscellany*

Any number of other features of the revision bill might be worth noting in a fuller review. Within the limits of this article, only a few will be mentioned here in passing.

1. Manufacturing Clause

A substantially curtailed "manufacturing clause" persists in the bill[85] as an avowed compromise. The requirement that copies be manufactured in the United States would be a good deal narrower than it is now with respect to the kinds of works affected, the conditions under which domestic manufacture would be required, and the extent to which copyright protection would be withheld for failure to comply.

2. Compulsory License for Recording of Music

The bill[86] continues in modified form the present provisions[87] enabling any person to make "mechanical recordings" (phonorecords) of music when such recordings have once been authorized. In addition

82 Section 111(c).

83 Section 111(b)(5)-(6).

84 Section 116.

85 Section 601.

86 Section 115.

87 17 U.S.C. §§ 1(e) and 101(e). The present compulsory license provisions and the problems they present are discussed in Henn, "The Compulsory License Provisions of the U.S. Copyright Law" (1956), Study No. 5 in Copyright Law Revision Studies.

to clarifying uncertainties as to how broadly the compulsory license applies, the bill would help to resolve some of the difficulties of enforcement now encountered by copyright owners, particularly by making available the usual remedies for infringement instead of the special limited remedies now provided. The bill would also raise the rate of the statutory royalty to be paid in the absence of different terms in a negotiated license.[88]

3. "Government Publications"

The statute now prohibits copyright in "any publication of the United States Government,"[89] but this term is not defined and there are differences of opinion as to the proper scope of the prohibition. The bill would clarify the matter by referring to the prohibited category as "any work of the United States Government" and by defining that term as "a work prepared by an officer or employee of the United States Government as part of his official duties."[90] Incidentally, this would continue to allow Government agencies to exercise discretion, when they make contracts or grants under which copyrightable materials may be produced, as to whether copyright in those products will be permitted.

4. Divisibility of Copyright

A number of court decisions have enunciated the theory that a copyright is an indivisible bundle of rights that can be owned as a single unit only. This has resulted in some confusion regarding the effect of grants, commonly made by authors or other copyright owners, of the exclusive right to exploit a work in a particular manner (*e.g.*, by publishing copies, or by giving public performances) or in a particular medium (*e.g.*, publication in hard-cover books only, or in a periodical).[91] The bill would settle the troublesome questions in this area by providing explicitly for partial transfers of ownership,[92] and for the right of a partial owner to sue for infringement.[93]

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88 Instead of the present statutory rate of two cents per record of a composition, the rate in the bill is two-and-one-half cents, or one-half cent per minute or playing time, whichever is higher.

89 17 U.S.C. § 8. This subject is discussed in Berger, "Copyright in Government Publications" (1959), Study No. 33 in Copyright Law Revision Studies.

90 Section 105.

91 The problems raised by the theory of divisibility are discussed in Kaminstein, "Divisibility of Copyrights" (1957), Study No. 11 in Copyright Law Revision Studies.

92 Section 201(d).

93 Section 501(b).

5. Statutory Damages

In general, the bill[94] maintains the remedial structure of the present law which provides for the recovery of the damages caused by an infringement and the infringer's profits, or, in lieu of actual damages and profits, an award of statutory damages in a sum to be fixed by the court within the range between a specified minimum and maximum.[95] The bill keeps the statutory minimum at $250, but adds the new provisos that the court may reduce the minimum to $100 against an innocent infringer, and may remit statutory damages completely against a teacher who reasonably believed that this infringing reproduction of a work for classroom use was a fair use. The statutory maximum would be raised from 5,000 to 10,000 dollars,[96] and a new provision would make this the total of the statutory damages allowable for multiple infringements (such as might occur in a network broadcast carried by 200 stations).[97]

6. Computer Uses

The bill makes no special provisions for uses of copyrighted material in computer systems. On this subject the House Judiciary Committee said in its report of October 12, 1966, on H.R. 4347:

> In the context of section 106 which specifies the kinds of uses that are subject to copyright, the committee believes that, instead of trying to deal explicitly with computer uses, the statute should be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works. . . .
>
> In various discussions since the hearings, there have been proposals for establishing voluntary licensing systems for computer uses, and it was suggested that a commission be established to study the problem and recommend definitive copyright legislative several years from now. The committee expresses the hope that the interests involved will work together toward an ultimate solution of this problem in the light of experience. Toward this end the Register of Copy-

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94 Section 504.

95 These provisions in the present law, 17 U.S.C. § 101(b), are discussed in Strauss, "The Damage Provisions of the Copyright Law" (1956), Study No. 22, and Brown, "The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study" (1958), Study No. 23, in Copyright Law Revision Studies.

96 The present law allows the court to exceed the maximum, without limit, for infringements occurring after written notice has been served upon the defendant. 17 U.S.C. § 101(b). The bill provides instead for increasing the statutory damages up to $20,000 for infringements proven to have been committed willfully: § 504(b)(2).

97 For examples of multiple infringement cases, see Davis v. E. I. Du Pont de Nemours Co., 249 F. Supp. 329 (S.D.N.Y. 1966); Law v. National Broadcasting Co., 51 F. Supp. 798 (S.D.N.Y. 1943).

right may find it appropriate to hold further meetings on this subject after passage of the new law. In the meantime, however, section 106 preserves the exclusive rights of the copyright owner with respect to reproductions of his work for input or storage in an information system.[98]

CONCLUSION

Copyright law revision involves a host of problems of varying magnitude, some resting on impalpable considerations, many having complex ramifications, and often requiring a choice or compromise between conflicting interests. There were a number of skeptics who voiced the thought, during the preparatory stages of the revision program, that a comprehensive revision of the law, though badly needed, could not be achieved in the welter of issues and disputes.

Eleven years of effort in which hundreds of persons have participated, representing every interest concerned and every shade of opinion, and climaxed by the painstaking attention of an informed Congressional committee, have produced a revision bill that may ripen before long into a legislative enactment.

Any one interest group can still point to some details in the present bill that are not entirely to its liking; some of the provisions in the bill represent compromises that do not comport with anyone's conception of philosophically ideal solutions, and a few areas of controversy are still smoldering and may flare up. On the whole, this writer believes that the bill represents a fair balancing of the equities in the light of our technology and knowledge of today and the foreseeable future, and that its enactment would mark a great advance in the pursuit of the Constitutional purpose, "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings. . . ."

[98] H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 53-54 (1966).